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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS DIVISION

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Plaintiff, v. CHEAPIES #2, LLC, a Limited Liability Corporation, And ADAM D. KING, Defendants.	)	Case No.: 3:17-cv-395

COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW Plaintiff, AMERICAN FAMILY MUTUAL INSURANCE COMPANY (hereinafter "American Family"), by and through its attorneys, BETH C. BOGGS, and BOGGS, AVELLINO, LACH & BOGGS, L.L.C., and for its Complaint for Declaratory Judgment, states as follows:

PARTIES

1. Plaintiff, American Family Mutual Insurance Company ("American Family"), is in the business of selling insurance, and licensed to do business in Illinois. American Family is a Wisconsin corporation with its principal place of business in Madison, Wisconsin, and therefore is a citizen and resident of Wisconsin.

2. American Family brings this action under 28 USC §§2201 and 2202, for declaratory relief regarding its obligations under the insurance policy described herein.

3. Cheapies #2, LLC, is an Illinois Limited Liability Corporation licensed to conduct business in Illinois, located at 3204 E. Broadway, Alton, IL 62002, and therefore a citizen and resident of Illinois.

4. Adam D. King is a natural person, residing in the State of Illinois, and a citizen and resident of Illinois.

JURISDICTION AND VENUE

5. This Court has original jurisdiction over this matter pursuant to USC §1332(a)(1) because the matter in controversy exceeds the sum of Seventy-Five Thousand Dollars ($75,000.00), exclusive of interest and costs, and the parties are citizens of different states.

6. Venue is proper pursuant to 28 USC §1391(b)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district and the policy was issued to a company in this district.

UNDERLYING LAWSUIT

7. American Family issued an Illinois Commercial General Liability Policy (CGL), Policy Number 12XM1595-03, to Cheapies #2, LLC, covering the tire business at 3204 E. Broadway, Alton, IL 62002 (hereinafter "the Policy"). The Policy affords coverage on a "claims made" basis. Subject to all of the terms, provisions, exclusions and endorsements, the Commercial Insurance Policy provides liability limits of $2,000,000.00 per occurrence and a general aggregate limit of $4,000,000.00. (A copy of the Policy is attached hereto as "Exhibit A" and incorporated by reference herein.)

8. Bernard Hicks ("Hicks"), as Special Administrator of the Estate of Aletha Wallace, and as Father and Next Friend of Minor Brenae Hicks, and as Father and Next Friend of Minor Brandi Hicks, has filed a Complaint at Law, filed in the Circuit Court of Madison County, Illinois, Cause No. 16-L-001702 (the "Complaint"), naming Cheapies #2, LLC ("Cheapies #2"), and Adam D. King ("King") as Defendants. (A copy of the Complaint is attached hereto as "Exhibit B" and incorporated by reference herein.)

9. The Complaint alleges that on or about October 22, 2016, an employee of Cheapies #2, Adam D. King, was driving a motor vehicle (the "Truck") owned by Cheapies #2 within the scope of his employment and agency, when he crossed the center line of East Broadway in Alton, Illinois, striking a vehicle driven by Debbie McKeown. Decedent Aleatha Wallace was a backseat passenger in the McKeown vehicle, as were her two minor children, Brenae Hicks and Brandi Hicks. All were allegedly injured in the accident, and Plaintiffs' allege Aleatha Wallace died as a result of her injuries. (See, Exhibit B.)

10. Count I of the Complaint at Law alleges negligence against Cheapies #2, LLC, by and through their alleged duly authorized agent, Adam D. King, for injuries and death to Aleatha Wallace. Count II alleges negligence against Cheapies #2, LLC, through agency in the same manner and against Adam D. King for negligence in causing injury and damage to Brenae Hicks and Brandi Hicks. Count III is directed to Cheapies #2, LLC, for failing to train and supervise Adam D. King, and also for improperly retaining him, causing injury and death to Aleatha Wallace. Count IV is directed to Cheapies #2, LLC, for failing to train and supervise Adam D. King, and also for improperly retaining him, causing injury and damage to Brinae Hicks and Brandi Hicks. (See, Exhibit B.)

THERE IS NO COVERAGE FOR DEFENDANTS

11. On or about October 22, 2016, Adam D. King did not have permission to use the vehicle, nor did he have permission to drive the Truck off the property owned by Cheapies #2, LLC.

12. The Truck allegedly driven by Adam D. King on the date of the occurrence was not licensed by the State of Illinois, and was intended for use only on the premises of Cheapies #2 business.

13. At the time of the alleged occurrence, Mr. King was not on company business when he drove the Truck off of Cheapies #2's lot.

14. The Policy contains the following important provisions:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we," "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** – Who is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** – Definitions.

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B.**

....

* * *

2. Exclusions

This insurance does not apply to:

....

g. Aircraft, Auto or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, or use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading and unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring or others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

....

* * *

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

....

c. A limited liability company, you are an insured. Your members are alos insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as managers.

....

2. Each of the following is also an insured:

a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) but only for acts within the scope of their employment by you while performing duties related to the conduct of your business.

....

* * *

SECTION V – DEFINITIONS

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2. "Auto" means:

a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.
However, "auto" does not include "mobile equipment."

3. "Bodily Injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

....

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

....

b. Vehicles maintained for use soley on or next to premises you own or rent;

....

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

....

18. "Suit" means a civil proceeding in which damages because of "bodily injury," "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

....

15. As noted above, Section II of the Policy cited above specifies who is an insured. In Subsection 2.a., the policy provides that employees (other than managers for limited liability companies) are insureds,"...but only for acts within the scope of their employment by you (the policy holder) or while performing duties related to the conduct of your business." (Section II.2.a.)

16. Because King did not have permission to drive the Truck off the premises of Cheapies #2 lot, and was not on company business at the time he was driving the Truck, he was not acting within the scope of his employment, and he is not an insured under the Policy. As a result, American Family has no obligation to defend or indemnify Cheapies #2 or King.

17. In the Complaint, Hicks further alleges that Cheapies #2 and King are liable for their ownership or use of the Truck.

18. As cited above, Section I – Coverages, Coverage A – Bodily Injury and Property Damage Liability, Section 1.a., the Policy clearly provides that American Family

has no duty to defend the insured for any "suit" seeking damages for "bodily injury" to which the insurance policy does not apply.

19. The Policy further provides, as cited above, that the insurance policy does not apply to aircraft, auto, or watercraft. (Section I.2.g.) The policy unambiguously excludes "bodily injury" arising out of the ownership, maintenance, use, or entrustment to others of any "auto" owned or operated by or rented or loaned to any insured. The exclusion explicitly includes a provision that it applies even if the claims against any insured alleged negligence or other wrong doing, in the supervision, hiring, employment, training or monitoring of others by the insured. (*Id.*)

20. As a result, there is no coverage under the Policy for the ownership or use of the Truck, and American Family has no obligation to defend or indemnify Cheapies #2 or King.

WHEREFORE, American Family is entitled to judgment declaring it has no obligation under the Commercial Insurance Policy to defend Cheapies #2, LLC, or Adam D. King with regard to any claims in the Complaint, and American Family is further entitled to judgment declaring it has no obligation under the Commercial Insurance Policy to indemnify Cheapies #2, LLC, or Adam D. Hicks in connection with any claims arising from the Complaint, and Plaintiff, American Family Insurance Company, demands judgment against Defendants as follows:

A. American Family has no obligation under the Policy to defend Cheapies #2, LLC, or Adam D. King with regard to any claims made by Bernard Hicks in the Complaint;

B. American Family has no obligation under the Policy to indemnify Cheapies #2, LLC, or Adam D. King in connection with any claims made by Bernard Hicks arising in the Complaint; and

C. Granting such other relief as this Court may find just and equitable, including the awarding of attorney's fees, interest, and costs.

Respectfully submitted,

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY

By: ______________________

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